JUDICIAL REVIEW OF ADMINISTRATIVE ACTION BY THE FEDERAL SUPREME COURT

IS there a definite body of administrative law concerning judicial review, in the Supreme Court of the United States, consisting of rules, principles, and standards readily to be ascertained, or is there only a developing body of general ideas, in a stage analogous to the early development of equity out of the common law? The phenomenal growth of executive justice in this country, during the second half of the preceding century, with the probability of a still greater growth in the near future, makes it desirable to ascertain to what extent the findings of these administrative bodies will be scrutinized by the courts, and particularly by the Federal Supreme Court. Executive justice has its defects, just as all social and legal institutions have; and the problem is to what extent can judicial justice, by way of review, correct those defects, either by a determination *de novo*, or by making the findings of the administrative officers conclusive? For it must not be supposed that judicial justice *per se* is the panacea for all administrative or executive ills; judicial justice also has its defects, and often a policy of non-review will secure a maximum of justice. The problem must be solved by a proper balancing of the various interests involved, individual or social. It was largely because of the defects of judicial justice, adhering to traditional rules of evidence and reasoning on old common-law analogies, that executive justice, with its more flexible applications of law to concrete cases and its greater responsiveness to the popular will, came in during the past two decades, and threatens to occupy more and more of the field of judicial justice.

In analyzing the decisions of the Federal Supreme Court with reference to the degree of judicial control over executive or administrative agencies, the conventional classification used by the Supreme Court will be followed, namely, (1) Questions of Procedure; (2) Questions of Jurisdiction; (3) Questions of Discretion; (4) Questions of Fact; (5) Questions of Law; (6) Questions of Mixed Law

and Fact. After it has been shown that this mode of treatment leads to inconsistent results, so far as establishing a general rule is concerned, it will be pointed out that what the Court is really doing, consciously or unconsciously, and what it should do, is balancing the various individual and social interests involved. For the problem is far too deep to be solved by stating that a particular case involves a question of fact or one of law, or one of mixed law and fact, and that therefore the court in reviewing it will reach a certain result. Such an approach is faulty, and leads to a falsely mechanical handling of the case.

I

Questions of Procedure

Since the Fifth and Fourteenth Amendments to the Federal Constitution provide, among other matters, that no person shall be deprived of life, liberty, or property without due process of law, the procedure of administrative agencies must satisfy this constitutional guaranty. With certain exceptions, this procedure must include notice and hearing to the party whose rights and liabilities are to be affected, an opportunity to introduce evidence in his behalf, and to examine the evidence of the adverse party.

It is well settled that it is not essential for due process of law that one have a hearing in a court of justice; an administrative hearing is sufficient.[1] Moreover, a single hearing, whether in a court or before an administrative official, meets the requirement of due process; the right of a hearing on appeal is not essential.[2] No special notice to the parties interested is required, where a statute fixes the time and place of meeting of any board or tribunal; the statute itself is sufficient notice.[3] Hence, it is not necessarily violative of due process if no hearing or notice is expressly provided. But while a statute may not in terms make any provision for a review of the proceedings of a particular administrative body, it

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[1] Den. *ex dem.* Murray *v.* Hoboken Land & Improv. Co., 18 How. (U. S.) 272 (1855); Davidson *v.* New Orleans, 96 U. S. 97 (1877); *Ex parte* Wall, 107 U. S. 265 (1882); Dreyer *v.* Illinois, 187 U. S. 71 (1902); Hurtado *v.* California, 110 U. S. 516 (1884).

[2] McKane *v.* Durston, 153 U. S. 684 (1894); Andrews *v.* Swartz, 156 U. S. 272 (1894); Pittsburgh, C. C. & St. L. Ry. *v.* Backus, 154 U. S. 421 (1894).

[3] Reetz *v.* Michigan, 188 U. S. 505, 509 (1903).

does not follow that such proceedings are beyond investigation in the courts; through proceedings by way of injunction, certiorari, or mandamus, the party aggrieved may have his hearing and obtain relief.[4]

Where summary action is required by the nature of the subject matter, no hearing before the particular board or official is necessary. This is true particularly in matters of taxation and revenue,[5] and questions arising under the "police power."[6] Here again, however, the litigant does eventually have his hearing in court, either in suing for the recovery of the tax or in a suit against the official who may have acted illegally. Where summary action without hearing would not be justified, there must be a hearing in the first instance before the administrative body. This is true in the admission, exclusion, and deportation of aliens,[7] the findings of public utility commissions,[8] the determinations of the federal land department,[9] the exclusion of matter from the mails[10] — to mention no others — in none of which findings is there the same requirement of summary action as in matters of taxation, public health, etc.

In certain matters, no hearing in the sense of examining the evidence of the adverse litigant and offering rebutting evidence, is ever given, either before administrative officials or the courts. This is the case in judicial review of the findings of military boards; no matter how arbitrary the procedure before the board itself, no relief will be given in the courts.[11] Only if the tribunal has acted

[4] Clement Natl. Bank *v.* Vermont, 231 U. S. 120 (1913); Hagar *v.* Reclamation Dist., 111 U. S. 701 (1884).

[5] Murray *v.* Hoboken Land & Improv. Co., 18 How. (U. S.) 272 (1855); Springer *v.* United States, 102 U. S. 586 (1880).

[6] North Amer. Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908); Hutchinson *v.* Valdosta, 227 U. S. 303 (1913); Lawton *v.* Steele, 152 U. S. 133 (1894).

[7] Japanese Immigrant Case, 189 U. S. 86 (1903); Zakonaite *v.* Wolf, 226 U. S. 272 (1912); Turner *v.* Williams, 194 U. S. 279 (1904); Kwock Jan Fat *v.* White, 253 U. S. 454 (1920); Fong Yue Ting *v.* United States, 149 U. S. 698 (1893).

[8] United States *v.* B. & O. Southwestern Ry., 226 U. S. 14 (1912) (*dictum*). See further, Chicago, M. & St. P. Ry. *v.* Minnesota, 134 U. S. 418 (1890); Oregon R. R. & N. Co. *v.* Fairchild, 224 U. S. 510, 526 (1912).

[9] Garfield *v.* Goldsby, 211 U. S. 249 (1908). *Cf.* Fairbanks *v.* United States, 223 U. S. 215 (1912).

[10] Smith *v.* Hitchcock, 226 U. S. 53 (1912).

[11] Reaves *v.* Ainsworth, 219 U. S. 296 (1911); Johnson *v.* Sayre, 158 U. S. 109 (1895); Mullan *v.* United States, 212 U. S. 516 (1909). As to division of opinion in the state courts in reviewing acts of boards of state militia, see Smith *v.* Hoffman, 166 N. Y. 462, 60 N. E. 187 (1901).

without jurisdiction can relief be given.[12] So also in the determinations of so-called "political" questions, by the President or Secretary of State, no hearing in the sense above used is given; as, for instance, whether a state has a republican form of government;[13] whether a certain treaty is in force;[14] whether the government of a foreign state is *de jure* or *de facto;*[15] and whether certain territory belongs to the government of the United States.[16] Likewise, in the removal of officials under the general power of removal by the President, no hearing in the sense of re-examination of the facts will be given.[17] So also where a statute provides for a mode of review, either administrative in its nature or by a particular court, the Supreme Court will not hear the case until that mode has first been followed.[18] Nor will the policy, wisdom, justice, or fairness of a state statute be subject to review or criticism by the Federal Supreme Court;[19] and the knowledge, negligence, methods, or motives of the legislature will not be inquired into in determining the validity of a statute that has been passed in due form.[20]

In the majority of cases as to the necessity of a hearing, the requirement seems to be that it must be oral. In the case of *Chicago, Milwaukee and St. Paul Railway Company* v. *Minnesota*,[21] Mr. Justice Blatchford said:

"No hearing is provided for, no summons or notice to the company, before the commission has found what it is to find and declared what it

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[12] Dynes *v.* Hoover, 20 How. (U. S.) 65 (1857); Smith *v.* Whitney, 116 U. S. 167 (1886).

[13] Taylor *v.* Beckham, 178 U. S. 548 (1900); Texas *v.* White, 7 Wall. (U. S.) 700 (1868); Luther *v.* Borden, 7 How. (U. S.) 1 (1849); Pacific States Tel. & Tel. Co. *v.* Oregon, 223 U. S. 118 (1912).

[14] Charlton *v.* Kelly, 229 U. S. 447 (1913); Terlinden *v.* Ames, 184 U. S. 270 (1902).

[15] Oetjen *v.* Central Leather Co., 246 U. S. 297 (1918); Underhill *v.* Hernandez, 168 U. S. 250 (1897); Amer. Banana Co. *v.* United Fruit Co., 213 U. S. 347 (1909).

[16] Jones *v.* United States, 137 U. S. 212 (1890); Williams *v.* Suffolk Ins. Co., 13 Pet. (U. S.) 415 (1839).

[17] Shurtleff *v.* United States, 189 U. S. 311 (1903); Reagan *v.* United States, 182 U. S. 419 (1901).

[18] Mellon Co. *v.* McCafferty, 239 U. S. 134 (1915); Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210 (1908); Johnson *v.* Wells Fargo & Co., 239 U. S. 234 (1915).

[19] Hunter *v.* Pittsburgh, 207 U. S. 161 (1907).

[20] Calder *v.* Michigan *ex rel.* Ellis, 218 U. S. 591 (1910).

[21] 134 U. S. 418, 457 (1890).

is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

On the other hand, there are some cases holding that no oral hearing is necessary. In *Smith* v. *Hitchcock* [22] the party contesting the right of the Postmaster General to execute an order putting his periodicals in another class, left printed briefs, without having an oral hearing before the post-office officials. The hearing was held adequate by the Supreme Court, Mr. Justice Holmes saying: [23]

"Beyond offering the printed brief the plaintiff's representatives showed no desire to be heard. This is not a case in which even by manner or indirection the plaintiffs were prevented from offering material evidence. . . ."

It would appear, therefore, that at least in property rights, if the party does not ask for an oral hearing, but does have opportunity to present all material evidence, such hearing is sufficient. If, on the other hand, he does request an oral hearing and it is denied, even though opportunity be given him to present written evidence, the Supreme Court will be likely to hold this an invalid hearing. On principle, it would seem that in certain cases, especially where human liberty is involved, the oral hearing is intrinsically more just; while, on the other hand, where rights of property are concerned, not infrequently the submission of written evidence and printed argument may result equally well in obtaining justice.

If a hearing, in immigration proceedings at least, has been found unfair, the Supreme Court will order the District Court to try the case on its merits.[24] If the officials erred in construing a statute, the proper disposition of the case will be to order the person detained to be discharged.[25] And should the immigrant appeal to the courts before exhausting his administrative remedies, the Supreme Court will dismiss the complaint; but in case of appeal from the inspector to the Secretary, new evidence, briefs, etc., can be submitted.[26] Where, as in rate regulation, the commission erroneously refused to

[22] 226 U. S. 53 (1912). [23] *Ibid.*, 61.

[24] Chin Yow *v.* United States, 208 U. S. 8, 13 (1908). Mr. Justice Holmes said in this case: "The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. . . ."

[25] Gegiow *v.* Uhl, 239 U. S. 3 (1915).

[26] United States *v.* Sing Tuck, 194 U. S. 161 (1904).

assume jurisdiction of the case, obviously the remedy must be to remand the case to the commission.[27] In the event that the evidence on which the commission based its findings is not substantial, a question of law arises, and the case will be disposed of by the court.[28] If the commission refused to take into consideration "facts and circumstances that ought to have been considered," the recent decision in *Ohio Valley Water Co.* v. *Ben Avon Borough*[29] requires that the case be sent back to the court having jurisdiction in the first instance, and an investigation *de novo* undertaken. It is submitted that the general principle as to disposition of cases, if the hearing has been inadequate, should be to remand all cases where there is no clear question of law involved and where the subject matter is unusually complex, or where there is no evidence of bias, prejudice, or arbitrary action; but where the case is not of an intricate nature, or where there has been arbitrary action, the courts should have power to dispose of the whole matter, in the interest of economy of time and money.

II

Questions of Jurisdiction

As the authority of administrative bodies depends largely on statutes, their action in any proceeding must appear to be within the scope of the authority thus conferred. Consequently administrative determinations of jurisdiction must be examined, on judicial review. No commission can be the final arbiter of its own jurisdiction; just as no corporation can conclusively determine whether its act is or is not *ultra vires*. Hence a judicial review of an administrative determination of jurisdiction and the exercise of powers thereunder must always be permitted to the party affected. In *Noble* v. *Union River Logging Railroad Company*[30] the Supreme Court said:

"In every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity."

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[27] I. C. C. *v.* Humboldt S. S. Co., 224 U. S. 474 (1912).
[28] I. C. C. *v.* Louis. & Nash. R. R., 227 U. S. 88 (1913).
[29] 253 U. S. 287 (1920).
[30] 147 U. S. 165, 173 (1893).

In a case where the determination of fact has failed to show that the administrative body had jurisdiction, the acts of that body are void; and such invalidity may be shown in any collateral proceeding. So in *Little* v. *Barreme*[31] the officer who had acted under a regulation issued by the President in excess of his authority was not protected under it; and in *Francis* v. *Francis*[32] it was held that the President was acting outside his jurisdiction in inserting in a certain land patent words restricting the power of alienation. And in *Dynes* v. *Hoover*[33] it was held that the determination of a naval court martial regarding jurisdiction was reviewable by the court. In *American Magnetic School of Healing* v. *McAnnulty*[34] the jurisdictional determination of the Postmaster General was held subject to review; and in the case of *Gegiow* v. *Uhl*[35] a jurisdictional error of immigration officials was reviewed. In *Interstate Commerce Commission* v. *Humboldt S. S. Co.*[36] the commission was compelled by mandamus to take jurisdiction of a case where it had erroneously ruled that it had no jurisdiction. Many of the erroneous determinations of jurisdiction arise from misconstruction of a statute or from mistakes of law; and it is doubtful whether a hard and fast line can be drawn between mistakes of law and mistakes of jurisdiction.

With reference to determinations of jurisdiction in the federal land office, an unusual distinction has been adopted. In *Noble* v. *Union River Logging Co.* the Supreme Court, speaking through Mr. Justice Brown, said:[37]

"There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. . . . This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally. . . ."

So, in that case, it was held that the Secretary of the Interior and the Commissioner of the General Land Office might be enjoined from revoking the approval of the plaintiff's maps for a right of way

[31] 2 Cranch (U. S.) 170 (1804).
[32] 203 U. S. 233 (1906).
[33] 20 How. (U. S.) 65 (1857).
[34] 187 U. S. 94 (1902).
[35] 239 U. S. 3 (1915).
[36] 224 U. S. 474 (1912).
[37] 147 U. S. 165, 173, 174 (1893).

over the public lands, even though the plaintiff secured the approval fraudulently. The Court said that the uniform rule had been that an act granting rights of way over public lands was a grant *in praesenti*, so that a revocation of that grant, in a collateral proceeding, was taking property without due process of law; and a direct proceeding must be brought to annul the grant. In *French* v. *Fyan*[38] it was held that the action of the Secretary of the Interior in identifying swamp lands, making lists thereof, and issuing patents therefor,[39] could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp lands, although his jurisdiction extended only to lands of that class.[40] So also in *Burke* v. *Southern Pacific R. R. Co.*[41] it was held that claimants of mineral rights in lands which had been patented, who asserted that the government was deceived as to the non-mineral character of the land held by the patentees, could not maintain a collateral attack upon the patent.

Hence it would appear that after the determination by the Federal Land Department of so-called "quasi-jurisdictional" matters the Supreme Court will not review them collaterally. But since even these matters can be reviewed in a direct proceeding, it is a safe generalization that erroneous determinations as to jurisdiction are reviewable by the Supreme Court.

III

Questions of Discretion

As the legislative branch of the government cannot lay down specific rules on certain subjects, but must leave to the administrative or executive officials discretion in the recognition and enforcement of personal and property rights, we need to examine the extent of judicial review of administrative discretion. In *Martin* v. *Mott*[42] it appeared that the President had been given discretion to call forth the militia when the United States should be invaded

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[38] 93 U. S. 169 (1876).

[39] See also United States *v.* Schurz, 102 U. S. 378 (1880).

[40] Where, however, there is a mistake of law as to whether certain lands were within the jurisdiction of the Land Department, then the patent is rendered void on its face. Louisiana *v.* Garfield, 211 U. S. 70, 77 (1908).

[41] 234 U. S. 669, 692 (1914).

[42] 12 Wheat. (U. S.) 19 (1827).

or in imminent danger of invasion, and it was held by the Supreme Court, Mr. Justice Story delivering the opinion, that whenever a statute gave a discretionary power to the President, to be exercised by him upon his own opinion of certain facts, he must be the sole and exclusive judge of the existence of those facts. In *International Contracting Co.* v. *Lamont*[43] the Supreme Court refused to review the discretion of the Secretary of War in his refusal to sign a certain contract with the complainant, Mr. Justice White saying the act was not ministerial, for the obligation was neither peremptory nor plainly defined. In *Kendall* v. *United States*[44] the Postmaster General was ordered by mandamus to credit certain government contractors with sums of money which Congress had ordered to be paid, on the ground that the act was merely ministerial and not discretionary. But in *Decatur* v. *Paulding*[45] the Court refused to review the discretionary action of the Secretary of the Navy in refusing a pension to the widow of a naval officer. Likewise in *Dunlap* v. *Black*[46] the court refused to mandamus the Commissioner of Pensions on the ground that his refusal to issue the pension was based on a discretionary power. In *United States ex rel. McBride* v. *Schurz*[47] a mandamus issued to the Secretary of the Interior, because his refusal was not discretionary. In *Butterworth* v. *Hoe*[48] the Commissioner of Patents had decided in favor of one of the patentees, but the Secretary of the Interior without authority had denied the claim. It was held that the Commissioner of Patents might be compelled to issue the patent, since it was a purely ministerial act. The principle that there can be no judicial review on matters of discretion is well established, and the citations need not be multiplied. The important question is, what is the criterion for ascertaining when there has been an exercise of a given discretionary power? In *Noble* v. *Union River Logging Co.*[49] the Supreme Court said that if under any view of the facts that could be taken the act was *ultra vires*, then the administrative official acted beyond the scope of his authority and beyond his discretion. This statement can at best serve only as a concise summary, not as a rule. Somewhere in the discretionary power given to an administrative official

[43] 155 U. S. 303 (1894).
[44] 12 Pet. (U. S.) 523 (1838).
[45] 14 Pet. (U. S.) 497 (1840).
[46] 128 U. S. 40 (1888).
[47] 102 U. S. 378 (1880).
[48] 112 U. S. 50 (1884).
[49] 147 U. S. 165, 171–172 (1893).

there must be a standard to govern his action. If this standard is not expressly stated in the statute under which the official acts, it must be determined from its purpose; that is, the general object it is seeking to accomplish and the circumstances which called it forth.[50] It would be impossible for any state legislature or for Congress to issue detailed orders covering all conceivable cases; the leaving to administrative officials of discretionary power to fill in details will not necessarily lead to injustice. Unless there has been an arbitrary exercise of discretion, through bias, fraud, or discrimination, judicial review of administrative discretion should be confined within narrow limits.

Moreover, in matters of discretion no judicial review will be granted where an official adopted a different ruling from that of his predecessor. In *Greenameyer* v. *Coate* [51] the former Secretary of the Interior, Mr. Bliss, had decided for the complainant in a certain homestead entry, but before the patent was executed Secretary Hitchcock, who succeeded Mr. Bliss, reversed the finding of his predecessor. The Supreme Court held that the decision of the predecessor did not bind the successor in office. Nor will judicial review be given in case the same incumbent of the administrative office changes his ruling with respect to the same party, where both rulings are clearly within the official's discretion.[52] It cannot be maintained that a doctrine analogous to estoppel or *res judicata* applies; for if it did there would be no exercise of discretion, and the statute would fail of its purpose.

IV

Questions of Fact

Since boards of administration or executive offices are created to determine matters of fact, examination must be made to ascertain how far there will be judicial review of these determinations.

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[50] Buttfield *v.* Stranahan, 192 U. S. 470 (1904); United States *v.* Grimaud, 220 U. S. 506 (1911); Mutual Film Corp. *v.* Indus. Comm. of Ohio, 236 U. S. 230 (1915).

[51] 212 U. S. 434 (1909).

[52] National Life Ins. Co. of U. S. A. *v.* National Life Ins. Co., 209 U. S. 317 (1908). So also in Pearson *v.* Williams, 202 U. S. 281 (1906), on newly discovered evidence, the former decision of the immigration officials permitting the immigrants to enter the country was reversed, and they were ordered deported. See also Brougham *v.* Blanton Mfg. Co., 249 U. S. 495 (1919).

In the admission and exclusion of aliens, the findings of the administrative officials will be held conclusive and binding on the Supreme Court, provided there has been a fair hearing and no error of law has been committed. This is also true when it is a question of deportation.[53] In *United States* v. *Ju Toy* [54] the Supreme Court decided that even an American citizen might have his rights to enter the country conclusively determined by the immigration officials. But in *Kwock Jan Fat* v. *White* [55] the Supreme Court appeared to be abandoning the *Ju Toy* case, under the claim that the evidence was not sufficient. Mr. Justice Clarke, in the latter case, speaking for the court, said:

"It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

This, it is submitted, is a sound position; for where allegations of citizenship are made by the immigrant, which make out a *prima facie* case, no administrative board should be permitted to determine that fact conclusively. But where there is no question of American citizenship, it is submitted that the doctrine of conclusive finality is sound. It may be justified on several grounds, from the standpoint of American policy: (1) That having the power to exclude entirely, by admitting the alien the government is conferring a privilege or bounty and not recognizing a legal right; (2) That to crowd our courts with litigation concerning aliens, by a judicial review of the findings of fact made by immigration officials, often unduly postpones the claims of American citizens to court recognition of their personal and property rights; (3) That the immigration laws themselves provide for review within the administration, and it is difficult to see why a review in a court on mere questions of fact should have more virtue.

Likewise the findings of the Postmaster General are held conclusive on matters of fact within his jurisdiction, provided a fair

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[53] Ekiu *v.* United States, 142 U. S. 660 (1892); Zakonaite *v.* Wolf, 226 U. S. 272 (1912); Fong Yue Ting *v.* United States, 149 U. S. 698 (1893); United States *v.* Zucker, 161 U. S. 475, 481 (1896); Turner *v.* Williams, 194 U. S. 279 (1904); Chin Yow *v.* United States, 208 U. S. 8 (1908); Tang Tun *v.* Edsell, 223 U. S. 673 (1912); Low Wah Suey *v.* Backus, 225 U. S. 460 (1912).

[54] 198 U. S. 253, 263 (1905).

[55] 253 U. S. 454, 464 (1920).

hearing has been had and no mistake of law has occurred, and the Supreme Court will not review his action. In *Public Clearing House* v. *Coyne*[56] the Postmaster General had excluded from the mails certain letters and advertisements on the ground that they were fraudulent methods of securing money from the public. The Supreme Court, after examining the evidence on which the Postmaster General based his decision, upheld the findings. Mr. Justice Brown, in delivering the opinion, said:

"We think it within the power of Congress to entrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases."

In this case the Supreme Court intimated something of the more remote reason behind its attitude toward the findings of fact by the Post Office Department. It said the postal service was not a necessary part of the civil government in the sense in which the protection of life, liberty, and property, the defense against insurrection and foreign invasion, and the administration of public justice are. On the contrary, the Post Office is a public function assumed and established by Congress for the general welfare, and the returns serve as revenue to the government, so that the Post Office Department operates as a popular and efficient method of taxation. Here, two ideas seem to be involved: (1) That a privilege is being conferred on those making use of the mails; (2) That the carrying of the mails results in an indirect form of taxation. In both privilege and taxation it has been seen that the Supreme Court will give but little review. Hence, if there has been a fair hearing, and no clear mistake in the application of law or construction of the statute, the findings of fact in the Post Office Department are generally held conclusive.

In the case of regulation of rates by public utility commissions, including the Interstate Commerce Commission, we find a somewhat closer review given to findings of fact. Even before the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*,[57] which took the

[56] 194 U. S. 497, 509, 510 (1904). But the mere opinion that there is a fraudulent scheme being carried on through the mails is not such a determination of fact as will be conclusively binding, on judicial review. Magnetic School of Healing *v.* McAnnulty, 187 U. S. 94 (1902).

[57] 253 U. S. 287 (1920).

position that on judicial review the court should examine the evidence *de novo*, the courts reviewed the findings of rate regulation bodies with close scrutiny. In *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co.*[58] the Supreme Court, while admitting that generally on questions of fact the finding of the commission would be binding, qualified the assertion with the requirement that there must be "substantial" evidence; and in other cases [59] the court says it will examine the evidence to ascertain whether or not the commissions were unreasonable in reaching their decisions on the facts. The cases show that the Supreme Court will look minutely into the whole record, more so, apparently, than it will in findings of fact made by the Postmaster General and immigration officials. But the mere fact that the commission gave too much weight to some parts of the evidence, or too little to other parts of it, has not, ordinarily, led the Supreme Court to upset the findings of fact, for,[60] as said by the court, this would make the commission, consisting of expert and experienced public officers, a mere instrument for the purpose of taking testimony to be submitted to the courts for action. The *Ohio Valley Water Company* case, *supra*, completely abandons this position, and gives to the rate regulation bodies not even the weight of findings by a jury. This, it is submitted, is an erroneous principle, and must be greatly qualified in the future. In the light of this decision, it is doubtful whether the position of the Supreme Court will still be maintained, as laid down in *Interstate Commerce Commission* v. *Illinois Central Railway Co.*,[61] that the determinations of fact made by the Commission will not be set aside merely because the court entertains a different conception of the correct principle of rate-making. Our whole doctrine of judicial review of findings made by rate regulation bodies is thrown into uncertainty by the *Ohio Valley Water Company* case, and what the effects will be can only be conjectured. Nevertheless, it is undoubtedly true that, as compared with the review of determinations of fact made by other administrative bodies, even

[58] 227 U. S. 88 (1913).

[59] Los Angeles Switching Case, 234 U. S. 294 (1914); B. & O. Ry. *v.* Pitcairn Coal Co., 215 U. S. 481 (1910); I. C. C. *v.* D. L. & W. Ry. Co., 220 U. S. 235 (1911); I. C. C. *v.* Union Pacific R. R., 222 U. S. 541 (1912); Atchison, Topeka & Santa Fe Ry. *v.* United States, 232 U. S. 199 (1914).

[60] Illinois Cent. R. R. *v.* I. C. C., 206 U. S. 441 (1907).

[61] I. C. C. *v.* Illinois Cent. R. R., 215 U. S. 452 (1910).

before this case, the closer scrutiny was given to public utility commissions. In attempting to explain this difference, it may be pertinent to cite a part of the opinion in *Texas and Pacific Railway* v. *Interstate Commerce Commission:* [62]

"Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

In this opinion the Supreme Court takes the position that a statesman-like attitude, and not a strict lawyer-like view, should be adopted in reviewing the findings of rate regulation bodies; that these bodies deal with important interests of commerce and property, of great value, bearing most intimately on the welfare of the nation at large. In the further course of its opinion, the court states that this type of legislation is experimental, and of its nature new and strange, and that such interpretation should be given it as best comports with the genius of our institutions. This attitude of the court, adopted some two decades ago, has more or less influenced the court ever since.

In determinations of fact made by officials in the Federal Land Office, a very limited scope of review is given. In *Johnson* v. *Drew* [63] an action of ejectment was brought to recover land granted under a patent. The defense was that at the time of issuing the patent the land was a part of Fort Brooke Military Reservation in the actual occupancy of the defendant, and therefore was not unoccupied and unappropriated land such as the statute required. It was actually found, however, that the land was public land, so that no question of jurisdiction was raised. But the Supreme Court said that the rule with respect to occupancy, undoubtedly was that the determinations by the Land Office were conclusive. Mr. Justice Brewer

[62] 162 U. S. 197, 219 (1896).

[63] 171 U. S. 93 (1898).

(who usually wrote the opinions in land cases when he was on the bench) said: [64]

"If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. . . ."

So also regarding the character of the land itself, a finding that it is swamp, saline, or mineral land is held to be conclusive.[65] Likewise in matters of determination of boundary [66] and of the amount or number of acres in the grant [67] the decisions of the Land Office are final. And if the office had valid jurisdiction, the fact that there was fraud in issuing the patent does not permit collateral attack.[68]

In land cases in the Supreme Court it is noticeable that the opinions holding the facts to be conclusive occasionally cite post-office cases reaching similar results, and *vice versa*. In the review of the findings of no other administrative departments is there recognition of such a rule. May this mutual citation not be due to the fact that in both sorts of cases we are dealing with questions of privilege conferred on individuals, and not with legal rights? In the administration of public lands the general rule has been to give something for nothing, or something great for something small. The well-known example was the homestead law, where the settler secured his one hundred and sixty acres of land for $1.25 per acre. Likewise there was the Reclamation Law, under which the price of an irrigated farm unit with water rights was fixed at its proportionate share (according to acreage) of the cost of the government irrigation works by which it was watered, a price payable on long-time credit without interest. Here are almost gratuitous dealings by the government with its citizens, and it may be that the Supreme Court, in examining the findings of the Land Office on such matters takes this fact perhaps unconsciously into consideration. Moreover, it should not be forgotten that there is within the administrative

[64] 171 U. S. 99

[65] Johnson *v.* Towsley, 13 Wall. (U. S.) 72 (1871); Wright *v.* Roseberry, 121 U. S. 488 (1887); Heath *v.* Wallace, 138 U. S. 573 (1891); McCormick *v.* Hayes, 159 U. S. 332 (1895); Burfenning *v.* Chicago, St. P., etc. Ry., 163 U. S. 321 (1896).

[66] Gardner *v.* Bonestell, 180 U. S. 362 (1901).

[67] Smelting Co. *v.* Kemp, 104 U. S. 636 (1881).

[68] Noble *v.* Union River Logging Co., 147 U. S. 165 (1893).

system itself opportunity for review of these findings of fact, by officials who are especially trained in land law and are conversant with local conditions. Hence only limited judicial review will be granted by the Supreme Court in these determinations of fact.

In the findings of fact made by customs officials, though the disposition of property belonging to American citizens may be involved, the tendency is not to review the conclusions, provided the officials have not exceeded their jurisdiction. In *Hilton* v. *Merritt* [69] the owner of imported goods brought an action to recover a sum alleged to have been levied in excess of their true value. The goods had been appraised according to the statutory requirement, which provided that the appraisement should be final. Appeal to the Secretary of the Treasury confirmed the decision of the collector, and the Supreme Court refused to examine evidence to the contrary, saying: [70]

"In the absence of fraud, the decision of the customs officers is final and conclusive, and their appraisement, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation."

Also in the earlier case of *Bartlett* v. *Kane* [71] the Supreme Court denied any review of the appraisement, although it was of the opinion that the method of chemical analysis employed to ascertain the value was not a safe guide and was inferior to the method of ascertaining the cost price in the markets of production.[72]

The Supreme Court puts its doctrine of non-review of the findings of fact by customs officials on the broad ground of convenience. In the *Merritt* case the opinion stated: [73]

"If, in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods."

And in the *Kane* case similar language was employed.[74]

Generally, therefore, when matters of revenue are involved, the conclusiveness of determinations of fact is recognized and no judi-

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[69] 110 U. S. 97 (1884).
[70] *Ibid.*, 105.
[71] 16 How. (U. S.) 263 (1853).
[72] *Accord:* Rankin *v.* Hoyt, 4 How. (U. S.) 327 (1846).
[73] 110 U. S. 97, 104 (1884).
[74] 16 How. (U. S.) 263, 272 (1853).

cial review will be undertaken. Historical usage and the necessities of government are, it is submitted, the controlling reasons in the minds of the Supreme Court for this attitude. Coupled with these reasons is the further one that the statutes give to the importer opportunity for administrative review by the Secretary of the Treasury, and it is difficult to see why a review, by trained experts, conscious of their responsibility and the nature of the interests involved, should not be as efficacious as court review.

This tendency to leave to administrative bodies the conclusive determination of questions of fact is apparently a sound principle. It can be justified on several grounds: (1) The modern situation requires more speedy administration of justice than can be secured in the courts; (2) The increase in litigation and growth of population during the last century have crowded the calenders of our courts; (3) The new demands made on administration by a crowded urban community often require summary action and informal procedure; (4) New demands are being made on courts, which were formerly handled either by the family, as in the reformation and correction of children, or by the legislature, as in questions of divorce; and lastly, (5) Archaic procedure in the courts, imbued with the idea that the common-law procedure is perfection and of the essence of the jural order, has prevented the development of speedy, inexpensive justice. With proper safeguards, there is no sound reason why administrative officials may not conclusively determine questions of fact.

V

Questions of Law

Because administrative bodies have to apply statutes and court decisions to the subject matter over which they have jurisdiction, the judicial review of so-called questions of law must be examined. In the opinions of the Supreme Court we find much language to the effect that errors of law by administrative officers will be reviewed. But the incorrectness of this broad generalization will be apparent from an inductive study of the cases. The methods of review on questions of law must vary with the varying character of the administrative body.

In examining orders issued by rate regulation bodies we find the Supreme Court giving close scrutiny to questions of law. In

Texas and Pacific Railway v. *Interstate Commerce Commission* [75] the complaint was that the railroad charged less for certain traffic billed through from foreign ports than for traffic originating in New York and New Orleans for transportation into the interior of the country. The commission refused to consider the competition existing between the railways and the ocean steamship lines between Liverpool and San Francisco by way of the Isthmus of Panama and Cape Horn. An order was consequently made requiring the railway to desist from the lower charge, on the ground that it was discriminatory. But the Supreme Court reversed this order, on the ground that it was a mistaken application of law, saying: [76]

"We have . . . to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the commission was right, then the order was lawful; otherwise, it was not."

The Supreme Court in this case required that the decision of the question of law by the commission must be "right," that is, a decision approved by the Supreme Court.[77] Likewise, if an order was rendered without any evidence whatever to support it, the question involves not an issue of fact, but one of law, which the Supreme Court will decide.[78] Moreover, if it is a question whether a carrier has held itself out to carry certain products, a question of law is involved, and is reviewable by the court.[79] While the sufficiency of evidence is a matter for the commission to decide, yet the legal effect of it is a question of law, to be reviewed by the court.[80] In none of the decisions on rate regulation where a question of law is involved do we find the test that the decision on a question of law will be upheld, "unless clearly erroneous," or unless

[75] 162 U. S. 197 (1896). Compare the method of reviewing a question of law in the Federal Land Department, as stated in West *v.* Hitchcock, 205 U. S. 80, 85 (1907): "If the Secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right."

[76] 162 U. S. 197, 210 (1896).

[77] C. N. O. & T. P. Ry. *v.* I. C. C., 162 U. S. 184 (1896); I. C. C. *v.* Alabama Midland Ry., 168 U. S. 144 (1897).

[78] Florida East Coast Ry. *v.* United States, 234 U. S. 167 (1914).

[79] United States *v.* Pennsylvania R. R. Co., 242 U. S. 208 (1916).

[80] I. C. C. *v.* Louisville & Nash. R. R., 227 U. S. 88 (1913).

"clearly and palpably incorrect." Here again, as in questions of fact decided by such commissions, one must remember the novelty of the mode of regulation and the vast interests involved; consequently there results a close scrutiny of decisions of law.

In the review of questions of law decided by the Land Office, on the other hand, we find a more liberal view. Only where there has been a clearly erroneous construction of a statute, or "common law" decision, will the Supreme Court review it. In *Burfenning* v. *Chicago, St. Paul, Minn. and Omaha Railway*[81] the plaintiff brought an action to recover possession of lands which his grantor had obtained as a patent from the Federal Government for services rendered during the Civil War. The lands were within the corporate limits of the city of Minneapolis at the time the patent was validated, and according to United States Revised Statutes [82] such lands were excluded from pre-emption and homestead. The plaintiff contended that the decision of the Federal Land Office that the land was public land subject to patent should be conclusive. But the Supreme Court denied this contention, saying this was a clear case of misconstruction, giving rise to a question of law which the court must review; but it intimated that if the decision was not clearly erroneous no review would be given. So in the case of *Weyerhaeuser* v. *Hoyt*[83] the Supreme Court refused to review a doubtful question of law, and virtually recognized the rulings of the Land Office in refusing to follow a former decision of the Supreme Court.[84] In the case of *Louisiana* v. *Garfield*[85] the Supreme Court held that where the Land Office had uniformly and for years construed the act in a certain manner, the court would not construe it otherwise; even though, were it an original question, it might disagree with the construction of the office.

As compared, therefore, with questions of law decided by rate regulation bodies, those decided by the Land Office are given less extensive judicial review. Besides the reasons already given for this difference of treatment, others may be found in the facts that in the Land Office a unique body of land law is developing, and

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[81] 163 U. S. 321 (1896).
[82] Sections 2258 and 2289.
[83] 219 U. S. 380 (1911).
[84] In Sjoli *v.* Dreschel, 199 U. S. 565 (1905).
[85] 211 U. S. 70 (1908).

the office itself is a peculiar kind of judicial organization. In *United States* v. *Minor* [86] definite language is employed to that effect:

"It has been often said by this court that the land officers are a special tribunal of a *quasi* judicial character. . . . There was nothing wanting to make such a proceeding [hearing, cross-examination, and re-hearing] in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the *conclusiveness*, which belong to such a final decree between the parties."

In organization and procedure,[87] as well as in the nature of the subject matter, there is a close analogy to regular courts. There is a right of appeal and review. Process issues to secure witnesses. Representation by counsel and cross-examination are permitted. There is a departmental bar to which attorneys are formally admitted. There are *ex parte* proceedings, and opportunities for contest, in many ways identical with an ordinary lawsuit. Affidavits for instituting applications or contests, like declarations or bills in lawsuits, are drawn up and filed. Judgment may be given by default. Hearings take place before the land register or receiver, similar to those before a master in chancery. Parties may make motions for rehearing. If it be objected that analogous procedure occurs before rate commissions, it may be answered that this is not entirely true, as appears from the Supreme Court's treatment of the Land Office. It looks primarily at the nature of the proceedings, saying that a judicial inquiry, such as occurs in the Land Office, investigates, declares, and enforces liabilities as they stand on present or past facts; legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to those subject to its power.

In questions of law decided by customs officials the Supreme Court will not review the decision unless the result is a clear overstepping

[86] 114 U. S. 233, 242, 243 (1885).

[87] *Cf.* the language of the Supreme Court with reference to the proceedings before the Virginia State Corporation Commission in Prentis *v.* Atlantic Coast Line Ry., 211 U. S. 210, 226 (1908); "But we think it equally plain that the proceedings drawn in question here are legislative in their nature. . . . The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ." Then follows a citation of many other cases adopting the same view. See also Laurence Curtis, 2d, "Judicial Review of Commission Rate Regulation," 34 HARV. L. REV. 862.

of jurisdiction. In the case of *In re Fassett* [88] the collector had decided that a yacht was an imported article under the customs act, and when the owner libeled the vessel, the question was whether the decision of the officer might be reviewed. It was held it might be, since this was clearly an erroneous construction of the act. Again, in *De Lima* v. *Bidwell* [89] the question was whether sugars from Porto Rico, which territory had been ceded to the United States, were imported within the meaning of the Customs Act. It was held that the finding of the collector was not conclusive on this question of the construction of the tariff act, as under the doctrine of *Woodruff* v. *Parham* [90] they were not imported at all. In case the statute provides a remedy without appeal to the courts, that remedy must be followed, even though it be exclusive.[91] In *Schoenfeld* v. *Hendricks* [92] it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted upon an importation of merchandise, the remedy given through the board of appraisers being exclusive. In such cases no judicial review whatever was given. The only remedy was an appeal to the Secretary of the Treasury, who was the sole judge whether a refund should be made to the aggrieved party. Such cases went to a great length in disallowing judicial review, and later legislation has restored the right of bringing suit against the collector. Only the necessities of government and historical usage seem to have justified such practice of non-review.

In reviewing errors of law made by the Postmaster General, the Supreme Court in the case of *American School of Magnetic Healing* v. *McAnnulty*, *supra*, stated that if any view of the facts could render certain mail lawful, a decision by the Postmaster General that it was unlawful would present a question of law reviewable by the Court. In that case, therefore, the mere fact that the Postmaster General was of the opinion that practising the art of healing by means of psychology was fraudulent, was an error of law, for this

[88] 142 U. S. 479 (1892).

[89] 182 U. S. 1 (1901).

[90] 8 Wall. (U. S.) 123 (1868).

[91] Cary *v.* Curtis, 3 How. (U. S.) 236 (1845); Arnson *v.* Murphy, 109 U. S. 238 (1883); Barney *v.* Watson, 92 U. S. 449 (1875).

[92] 152 U. S. 691 (1894).

could not be said to be the case on every view of the facts; reasonable persons might differ on that question. Whether the close scrutiny by the court of questions of law decided by this administrative official has any relation to the fact that there is no administrative review of his findings, is only conjectural; but it is at least arguable that this fact has some bearing on the attitude taken by the Supreme Court in the extent to which it will review his decisions. If the question of law decided is doubtful, however, the Supreme Court will not review it.[93]

In *Gonzales* v. *Williams*[94] the Supreme Court reviewed a so-called question of law decided by immigration officials. Miss Gonzales was a native of Porto Rico who was denied entrance to the United States on the ground that she was an alien, and likely to become a public charge. Before appealing to the Secretary of the Treasury she sued out a writ of *habeas corpus*, contending that under the various treaties between this country and Spain, and the proclamations by the government of the United States, she was not an alien. The immigration officials construed the word "alien" in the federal statute to mean a person not an American citizen; but the Supreme Court held this to be an erroneous construction, saying that the word "alien" meant a person who owed allegiance to some foreign power. Under this holding Miss Gonzales was permitted to enter the United States.[95] If the evidence does not support the conclusions of fact, a question of law arises and the court will review the findings.[96] No criterion other than those already mentioned seems to have been laid down to determine when a question of law is presented on which review will be given.[97]

[93] Bates & Guild Co. *v.* Payne, 194 U. S. 106 (1904).

[94] 192 U. S. 1 (1904).

[95] See for a similar case, Gegiow *v.* Uhl, 239 U. S. 3 (1915).

[96] Zakonaite *v.* Wolf, 226 U. S. 272 (1912).

[97] How far the Supreme Court will follow long-recognized constructions of statutes by administrative officials is difficult to say. There are decisions which vary with the character of the executive body involved. In United States *v.* Philbrick, 120 U. S. 52, 59 (1887), the Supreme Court recognized the long-established practice of the Secretary of the Navy; so also in McMichael *v.* Murphy, 197 U. S. 304 (1905); Hawley *v.* Diller, 178 U. S. 488 (1900), a long-recognized construction of the Land Department was followed by the court. Long practice and usage, with implied acquiescence on the part of Congress, the court considered in United States *v.* Midwest Oil Co., 236 U. S. 459 (1915), as giving to the President authority to exercise certain powers over the public lands of the United States, apart from any grant by the Constitution or

As to the general principle governing judicial review to correct errors of law, it is submitted that, with improvement in the personnel of administrative bodies, decisions of law should come to be reviewed only if palpably erroneous. It is true that judicial justice has many advantages over executive justice. There is the trained legal mind of the judge, which often stands out for law against popular excitement and clamor; there are checks on the judge through criticism from the bar and through the publication of judicial decisions. But executive justice may possess similar safeguards and advantages. These advantages are becoming more and more common, as trained lawyers, and often judges, are chosen to fill administrative positions, while their decisions, especially in the field of regulation of public utilities, are frequently published, affording opportunity for study and criticism by the public, as well as by the legal expert. With such a personnel filling administrative offices, more authority should certainly be given to the decisions of the administrative agency than to the findings of an untrained jury; but this position has, confessedly, not yet been generally reached in the field of administrative law. With such safeguards as have been suggested, executive justice, with its simpler procedure and freedom from traditional rules of evidence, ought to be more efficacious than judicial justice in settling the affairs of a busy world.

VI

Questions of Mixed Law and Fact

Because the determination of fact and the application of law to fact frequently confront the administrative officials together, it will be necessary to examine the scope of judicial review over what may be called questions of mixed law and fact. Whether the

Congress. In Bates & Guild Co. *v.* Payne, 194 U. S. 106 (1904), the Supreme Court recognized and approved the practice of the Post-Office Department in refusing to follow a former construction of the post-office officials of sixteen years' duration. On the other hand, in United States *v.* Healey, 160 U. S. 136, 145 (1895), the court said that where the practice of the administrative body in construing a statute was not uniform, the court deemed it its duty to give the true interpretation to the act, without reference to the practice of the department. And in Fairbank *v.* United States, 181 U. S. 283, 308 (1901), it was said that where the meaning of the statute was clear, contemporary executive construction would not be consulted by the Supreme Court. In general, it may be said that long construction is entitled to great weight in the courts, and should be adopted unless clearly erroneous.

cases themselves can be so classified, on principle, is doubtful. To designate a particular case as one of "mixed law and fact" may be a useful mask to hide a multitude of difficult problems of the balancing of interests, so that as a shorthand expression the phrase serves a purpose in judicial review, and must be reckoned with.

This method of treating a case as one of "mixed law and fact" is well stated in *Bates and Guild Co.* v. *Payne*,[98] where the Supreme Court, upholding the Postmaster General in ignoring a practice of sixteen years as to classification of periodicals, said:

"Where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. . . . The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance."

The court further stated that while a comparison of the complainant's periodical with the statutory requirements might raise only a question of law, nevertheless the action of the Postmaster General may have been guided by extraneous information; hence it was not possible to separate the question of law from the question of fact.

A similar doctrine as to mixed law and fact was laid down in the case of *Marquez* v. *Frisbie*,[99] a case involving a patent for land. The bill prayed that the defendants be declared to hold the land in trust for the plaintiff and to convey the legal title. It appeared plaintiff had been in possession for fourteen years, and that the Commissioner of the General Land Office had ruled that the lands were subject to pre-emption under the general land laws, but that the Secretary of the Interior had reversed that finding, and issued an order authorizing the defendants to enter the lands. The Supreme Court, in reviewing the determination of the federal administrative officials, found that the plaintiff never had the title, as no patent had yet been issued, and therefore it denied relief, saying it was not clear, as a matter of law, that the department had given land belonging to one party to another.[100]

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[98] 194 U. S. 106, 108, 109 (1904).

[99] 101 U. S. 473 (1879).

[100] See also Ross *v.* Day, 232 U. S. 110, 117 (1914); Ross *v.* Stewart, 227 U. S. 535 (1913); Whitcomb *v.* White, 214 U. S. 15, 16 (1909).

As intimated in the *Payne* case, *supra*, this doctrine regarding mixed law and fact, with consequent disallowance of judicial review, is useful for the division of labor between the administrative bodies and the courts, and disposes of many cases. While the result attained is undoubtedly desirable, it seems unnecessary to create a distinct category of mixed law and fact, separate from those of law and of fact; for no logical process can so analyze all the various matters involved in the cases. Men's minds are complex, and recognition must be given to many sub-conscious impulses and feelings. What the courts are really doing in adopting a policy of non-review where so-called questions of "mixed law and fact" are involved, is according a greater respect to the findings of administrative bodies, seeing in them the determinations of experienced men of affairs, who are guided by that superior knowledge which comes from actual contact with an actual situation, and who know better than others what should be done under given circumstances. In other words, here at least the courts are attempting to give to the findings of administrative bodies the respect paid to those of a jury when it returns a general verdict.

VII

Summary and Conclusion

Since the present tendency in the Supreme Court is more and more to limit the scope of judicial review of administrative action, it seems probable, barring a few sporadic exceptions, that the future policy of the court will be to permit it on two grounds only: (1) Where there has been an improper procedure, violating those principles of fairness and justice which satisfy the minimum of due process of law; and (2) Where the administrative official has acted beyond the sphere of his jurisdiction. Why special virtue or sanctity should attach to judicial review in other than the above cases is difficult to see. In this connection the dissenting opinion in *Chicago, Milwaukee, and St. Paul Railway Company* v. *Minnesota*,[101] is pertinent:

"It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every

[101] 134 U. S. 418, 465 (1890).

question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures."

That the above position is being adopted in England is indicated by Mr. Dicey in his article "Development of Administrative Law in England," [102] where he says:

"There remain two checks upon the abuse of judicial or quasi-judicial powers by a government department. In the first place, every department in the exercise of any power possessed by it must conform precisely to the language of any statute by which the power is given to the department, and if any department fails to observe this rule the courts of justice may treat its action as a nullity. This is the effect of *Board of Education* v. *Rice* (1911, A. C. 179, 80 L. J. K. B. 796). In the second place, a government department must exercise any power which it possesses, and above all any judicial power, in the spirit of judicial fairness and equity, though it is not bound to adopt the rules appropriate to the procedure of the law courts. This duty of compliance with the rules of fair dealing is insisted upon by the House of Lords in *Local Government Board* v. *Arlidge* (1915, A. C. 120, 84 L. J. K. B. 72)."

Perhaps the doctrine of judicial review held by the Supreme Court has not yet gone so far as Mr. Dicey believes that of the British courts has gone. In actual fact the present situation regarding judicial review of administrative action may be summarized as follows:

1. The conclusiveness of administrative findings must be conditioned on a procedure which is consistent with due process of law. Being a standard of conduct and not a mechanical rule, a detailed definition ought not to be attempted. But an essential element is that somewhere along the line a hearing of some kind must have been given before a party's rights or liabilities are affected. This hearing must include opportunity to present evidence and to inspect that of the opponent.

2. Where the nature of the subject matter is such that summary action is indispensable, no hearing before the administrative body itself, in the first instance, is necessary. But a hearing must in some cases, and usually does in others, follow in the court or in some higher administrative body, as statutes may provide.

3. In cases where there is a hearing in the first instance before the

[102] 31 L. QUART. REV. 148, 151.

administrative body, no violation of due process occurs simply because that hearing is made final, whether on a question of fact or of law.

4. It must always appear that the particular administrative body acted within the scope of the power delegated, and its findings are subject to challenge because of fraud or bias.

5. The extent of judicial review will often depend on the nature of the interests dealt with by the administrative body. When the government is dispensing a bounty, when it is admitting aliens, a proper balancing of the interests involved leads the Supreme Court to give greater liberty to the executive officials; when vested rights, or personal liberty are involved, a more rigid control is kept over executive officers. This results in having rules of one kind for the exercise of the police power, of another for taxation, of another for aliens, and of still another for the operation of various kinds of public businesses.

The balancing of interests must be the dominant principle behind the judicial review of executive justice. With the continual extension of government activity and the growing complexity of interests; with the increase in population and its concentration in large urban centers, involving of necessity a desire for more speedy justice, administered by men more conversant with the *de facto* social and economic conditions of local communities, court review of administrative action must be limited more and more, if the government is to be left free to carry out its proper and necessary functions, and if much of our social legislation is to succeed. Mere improvement in judicial procedure, though of inestimable benefit, cannot eradicate judical habits of thought on the part of the bench, trained in the view that the common law is the embodiment of natural law and reason, and that the rules of evidence as worked out by the past are part of the order of nature. While some of this conservatism is undoubtedly necessary and proper, it must yield before new needs and changes of environment. If justice can be secured through executive officials, there is no reason why judicial review should enhance it by any intrinsic merit of its own. As Mr. Dicey says: "The management of business, in short, is not the same thing as the conduct of a trial. The two things must in many respects be governed by totally different rules."

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